

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1315 of 1998

in

SPECIAL CIVIL APPLICATION No 772 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

MR.JUSTICE A.L.DAVE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

M S UNIVERSITY

Versus

PRAVINBHAI SAVINLAL JAISWAL

Appearance:

MR NV ANJARIA for Appellant

MR BS PATEL for Respondent No. 1, 2, 3, 4, 5

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE A.L.DAVE

Date of decision: 21/01/99

ORAL JUDGEMENT (per B. C. Patel,J)

The present appeal is filed by the Maharaja Sayajirao University of Baroda against the order passed by the learned single Judge (Coram: K. R. Vyas,J) on 5-10-1998 in Special Civil Application No. 772 of 1998 whereby, by way of an interim order, the University authorities were directed not to fill up five posts of Technical Assistants (Library), except by taking appropriate decision in accordance with law.

2. The petitioners, by filing the aforesaid petition, prayed for issuance of a writ in the nature of mandamus or any other appropriate writ, order or direction quashing and setting aside the decision at annexure-A (Resolution passed by the Syndicate, the Maharaja Sayajirao University of Baroda on 20th September, 1997) and to direct the respondents to operate the select list at annexure-C.

3. M. S. University of Baroda, vide notification No.ADE/4 of 1996-97 dated 6th December, 1996 issued advertisement for various posts, which included seven posts of Technical Assistants (Library). The note at the bottom of the notification makes it clear that the number of posts shown in the notification were as per the situation existing at the relevant time, i.e. the advertisement was only for the existing vacancies. At the same time it was kept open to prepare a waiting list for future vacancies wherever required.

4. It appears that after screening the eligible candidates the Selection Committee made its recommendation for Technical Assistants (Library) and it also appears that by Resolution dated 23-9-1997 the persons recommended by the Selection Committee were ordered to be appointed as Technical Assistants (Library) in the University Library System with the pay-scales shown against their names. The Selection Committee further resolved that the name of Shri Solanki Mahendra M be kept on the waiting list against SC post and the seven persons named in the resolution of the Selection Committee were to be kept on the waiting list for a period of one year from the date of the Syndicate Resolution. It was made clear that it was only for the posts advertised in the notification and was not to be operated for future vacancies. This resolution was

placed before the Syndicate on 23-9-1997 and accordingly the Syndicate resolved that the list against open posts for a period of one year from the date of Syndicate Resolution will be kept operative only against the posts advertised in the notification and will not be operated for future vacancies.

5. It is submitted by Mr. Patel appearing for the original petitioners that the petitioners were working with the University and were selected and were placed on waiting list. Not only that, but they were even asked to officiate as Technical Assistants (Library). It is also submitted that the future vacancies which were likely to arise were also required to be considered and, according to him, therefore, in the notification it is mentioned that the University may prepare a waiting list for future vacancies wherever required. He drew our attention to the recommendation made by the Selection Committee vide annexure-D. Reading the resolution it appears that the Committee considered the candidates suitable for appointment and indicated the number of candidates with the names in the order of merits. But so far as the recommendations are concerned, we have pointed out earlier that the Selection Committee passed a resolution that the persons who have been enlisted in the waiting list were to be appointed only against the posts advertised in the notification and that the list was not to be operated for future vacancies.

6. Mr. Patel further submitted that so far as Clerks / Typists are concerned, the list is made operative for a period of seven years. However, by using the method of pick and choose, so far as the Technical Assistants (Library) are concerned, it is not only made operative for a period of one year but is operated only for the posts advertised. He further submitted that in past one Mr. Shukla, who was on the waiting list for future vacancies, was appointed. He further submitted that the original petitioners approached the University including the Syndicate and Senate Members; and the Registrar of the University forwarded supplementary agenda for the meeting which was held on 18-10-1997. The agenda at serial No.52 of the letter of the Registrar reads as under:

"52. Consideration of the request of the Syndicate Members and also members of the Senate regarding maintaining the waiting list for the post of Technical Assistant by reconsidering S.R. No.20 dated 23-9-1997, which was passed in pursuance of the report of the Selection

Committee for the post of Technical Assistant
(Library System)."

It appears that the office note was placed in the meeting, suggesting that the waiting list be for future vacancies when ever required. At the time of discussion the same was required to be considered. Therein also it was clearly pointed out that resolution was passed stating that the waiting list be operative for a period of one year from the date of the resolution and the same will be prepared for the posts advertised in the notification and will not be operated for the future vacancies. It appears that at the meeting it was resolved that the item be considered to be withdrawn as the same was withdrawn by the Chair. Mr. Patel submitted that considering the case as a whole, as they were selected and the representation was forwarded which was included in the form of agenda, it was necessary for the Syndicate to express the opinion one way or the other and could not have been withdrawn by the Chair. Mr. Patel's contention is devoid of merits as the coram at the meeting had passed the resolution indicating the application of mind by the members.

7. We find it difficult to agree with any of the aforesaid submissions made by Mr. Patel. So far as the Selection Committee is concerned, after interviewing the candidates it was of the view that the candidates enlisted in the waiting list should be considered only against the posts advertised in the notification and they were not to be considered for future vacancies. That is approved by the Syndicate in its meeting held on 20th September, 1997 which has been placed on record. Thus it is very clear that the waiting list was to be operative against the open posts for a period of one year from the date of the resolution and only against the posts advertised in the notification and was not to be operated for future vacancies. After seven vacancies as advertised were filled in, the question of considering the candidates in the waiting list would arise only in case, out of the seven candidates who were appointed, any one or more have refused to join duty.

8. In the case of State of U.P. vs. Harish Chandra, AIR 1996 SC 2173, the Apex Court considered the recruitment rules and the rights of persons in the waiting list. The Court pointed out that under the Constitution, a mandamus can be issued by the Court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and said right was subsisting on

the date of the petition. In that case the persons who were in the waiting lists were ordered to be recruited by the High Court. They were included in the select list prepared on 4-4-1987 and the list did not survive after one year, and the rights, if any, of the persons included in the list did not subsist. The Apex Court observed as under:

"Even though we are persuaded to accept the submission of the learned counsel for the respondents that on some occasion appointments have been made by the Appointing Authority from a select list even after the expiry of one year from the date of selection but such illegal action of the Appointing Authority does not confer a right on an applicant to be enforced by a Court under Article 226 of the Constitution. We have no hesitation in coming to the conclusion that such appointments by the Appointing Authority have been made contrary to the provisions of the Statutory Rules for some unknown reason and we deprecate the practice adopted by the Appointing Authority in making such appointments contrary to the Statutory Rules. But at the same time it is difficult for us to sustain the direction given by the High Court since, admittedly, the life of the select list prepared on 4-4-87 had expired long since and the respondents who claimed their rights to be appointed on the basis of such list did not have a subsisting right on the date they approached the High Court. We may not be understood to imply that the High Court must issue such direction, if the writ petition was filed before the expiry of the period of one year and the same was disposed of after the expiry of the statutory period. "

Mr. Patel, learned advocate submitted that it was the duty of the University to anticipate the vacancies that might arise in future, i.e. within a period of one year and anticipating that the list must be prepared so that the candidates selected can be appointed. For this he has relied upon the Apex Court's decision in the case of K. Jayamohan vs. State of Kerala, AIR 1997 SC 2619, wherein the Supreme Court in para 5 of the judgment has observed as under:

" The appointing authority must give reasonable explanation for non appointment. Equally, the Public Service Commission / recruitment agency

shall prepare waiting list only to the extent of anticipated vacancies."

As against this, Mr. Shelat, learned counsel, submitted that the court in this very judgment has pointed out that if the advertisement was restricted to existing vacancies, then it is not incumbent upon the authorities to appoint candidates from the waiting list. The person in the waiting list has no right to appointment. Relying on the decision it is pointed out that if the appointment is made it would be violative of Articles 14 and 16 (1) of the Constitution of India as the candidates eligible are denied the opportunity for applying for selection and get them tested on merits. In para 4 of the judgment the Court has pointed out this specifically.

9. Mr. Shelat drew our attention to the Apex Court's decision in the case of Sanjoy Bhattacharjee vs. Union of India, AIR 1997 SC 2179. In that case 480 vacancies were notified and the appellant was at serial No.779 in the list. In that case instead of making appointment from the waiting list the authorities issued notification for fresh recruitment and it was contended that the same would be defeating the right of the petitioners and others similarly situated. The Apex Court pointed out that merely because the petitioner has been put in the waiting list he does not get any vested right to an appointment. It is not his case that any one below his ranking in the waiting list has been appointed which would give him cause for grievance. In para 4 of the judgment the Court observed as under:

"For subsequent vacancies, every one in the open market is entitled to apply for consideration of his/ her claim on merit in accordance with law and it would be consistent with the provisions of Articles 14 and 16(1) of the Constitution. Therefore, direction sought for not to fill up the vacancies having arisen subsequently until the candidates in the waiting list are exhausted cannot be granted. The Tribunal rightly refused to grant any such direction. "

10. Our attention was drawn to the case of Surinder Singh vs. State of Punjab, AIR 1998 SC 18. In para 14 of the judgment the Apex Court considered the case of Gujarat State Dy. Executive Engineers Association, 1994 Sup (2) SCC 591, wherein the court has explained and pointed out the scope and intent of a waiting list and how it is to operate in service jurisprudence. The Court

pointed out that it cannot be used as a perennial source of recruitment filling up the vacancies not advertised. The Apex Court did not approve the view of the High Court that since vacancies had not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed. The Court specifically pointed out that the candidates in the waiting list, even if operative, have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason. Mr. Shelat, learned counsel, relying on this decision submitted that the seven posts were filled in and it is not the case that the seven persons who were appointed refused to join or any one of them has refused to join. If that would have been the case the person who is in the waiting list was to be considered, and that too if the list is operative. In the instant case the list was operative for a period of one year only. The Apex Court in the aforesaid case specifically pointed out in para 15 of the judgment as under:

"It is in no uncertain words that this Court has held that it would be improper exercise of power to make appointments over and above those advertised. It is only in rare and exceptional circumstances and in emergent situation that this rule can be deviated from. .. It is not as a matter of course that the authority can fill up more posts than advertised."

Thus it is clear that if the advertisement was only for seven posts then only seven posts were to be filled in and for some unavoidable circumstances if one refused to report for duty a person can be appointed from the waiting list. But, for posts which were not advertised, persons on waiting list cannot insist that he should be appointed on the posts.

11. In view of the aforesaid decisions of the Apex Court it would not be proper for the court to direct the University to consider the names of the persons on the waiting list for the posts which were not advertised. If the vacancy has arisen subsequently then advertisement is a must. It is only for the posts that are advertised, the persons who are eligible or who have become eligible will be in a position to apply. In view of the aforesaid position it is very clear that the High Court, exercising power under Article 226 of the Constitution, cannot direct the authority to appoint persons from the waiting list for the posts which were never advertised. Mr. Shelat submitted that the approach of the University is required to be considered in the instant case.

Considering the aforesaid decision he submitted that the approach of the University is quite rational. It is equally for the University to see that those who have become eligible should not be deprived of their right to be tested and if they are selected then on merits naturally they would be entitled to get appointment. In public employment it is absolutely necessary that more meritorious persons, if available, should be appointed. Once we find that the approach of the University is rational, it would not be proper on our part to direct the University to consider the names of the persons who were in the waiting list.

12. It is pointed out to us by Mr. Patel that it is because of the proceedings the original petitioners have not applied for the posts advertised by the University. In view of what is stated in para 5 of the affidavit filed by Shri Prakash Shah, respondent No.2, it would be just and proper to direct the University to accept the applications of the petitioners and to consider the same in accordance with law. If that is done no prejudice will be caused to the petitioners. They must compete with others.

13. Mr. Patel states that within a period of ten days the original petitioners will apply for the posts in question. On behalf of the University, Mr. Anjaria states that the petitioners will be given the forms and if the same are received within a period of ten days from today the same will be considered in accordance with law.

14. In view of what we have stated hereinabove, we allow this appeal, and quash and set aside the interim order passed by the learned single Judge on 5-10-1998 in Special Civil Application No.772/98. The appeal stands allowed accordingly. No order as to costs.

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